TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~277.~~ 67

WILLIAM S. MANNING, PLAINTIFF IN ERROR,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The John Hancock Mutual Life Insurance Company and William S. Manning, a manifest error hath happened, to the great damage of the said William S. Manning, as is said, and as appears by his complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of February, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth.

JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that by virtue of the foregoing writ of error, and in obedience thereto, that the following pages, numbered from one to fifty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William S. Manning, plaintiff in error, against The John Hancock Mutual Life Insurance Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28th day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) E. & A. D., No. 2, p. 361. U.S. circuit court. The John Hancock Mutual Life Insurance Company, def't in error, vs. William S. Manning, pl'ff in error. Writ of error.

Filed Feb'y 18, 1876.

GEO. V. N. BALDWIN,
Att'y for Pl'ff in Error, No. 79 Cedar St., N. Y.

The within writ allowed.

WM. J. WALLACE, *U. S. D. J.*

3 Circuit court of the United States for the southern district of New York. Of the eighth day of January, in the year one thousand eight hundred and seventy-two.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The John Hancock Mutual Life Insurance Company, the plaintiffs in this suit, a corporation duly created by and existing under the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, complains of William S. Manning, a citizen of the State of New York, defendant in this suit, being in custody, of a plea of trespass on the case upon promises:

For that, whereas the said defendant, heretofore, to wit, on the fourth day of June, in the year one thousand eight hundred and seventy-one, at the district aforesaid, was indebted to the said plaintiffs in the sum of ten thousand dollars, lawful money of the United States of America, for so much money by the said defendant before that time had, collected, and received, as the agent of the said plaintiffs in and about the business of the said plaintiffs; and, being so indebted, the said defendant,

4 in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of ten thousand dollars, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year as last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of ten thousand dollars, like lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant; and, being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the same day and year aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last above mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the

5 same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of ten thousand dollars, like lawful money as aforesaid, for so much money before that time paid, laid out, and expended by said plaintiffs to and for the use of said defendant, and at the like special instance and request of the said defendant; and being so indebted, the said defendant in consideration thereof afterward, to wit, on the day and year last aforesaid, at the place aforesaid, undertook and then and faithfully promised well and truly to pay unto the said plaintiffs the said sum of money last above mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, was indebted to the said plaintiffs in the further sum of fifteen thousand dollars of like lawful money as aforesaid, for so much money before that time had and received by the said defendant to and for the use of the said plaintiffs; and being so indebted, the said defendant in consideration thereof

6 afterwards, to wit, on the day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant, although often afterwards requested

so to do, hath not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto altogether refused, and still doth refuse, to the damage of the said plaintiffs of thirty thousand dollars; and therefore the said plaintiffs bring their suit, &c.

SCUDDER & CARTER,
Plaintiffs' Attorney.

7 (Indorsed:) U. S. circuit court southern dist. of New York. The John Hancock Mutual Life Ins. Co. vs. William S. Manning. Narr. Scudder & Carter pl'ffs' att'ys. Filed March 30, '72.

8 Circuit court of the United States for the southern district of New York.

WILLIAM S. MANNING
ads.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company.

And the said defendant, by Geo. V. N. Baldwin, his attorney, comes and defends the wrong and injury, and saith:

I. That he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country.

II. And, further pleading, the defendant denies each and every one of the allegations in the complaint, declaration, or narr. herein contained.

III. And the defendant further alleges, and as a counter-claim to the matter set forth in the said declaration or narr., that heretofore, to wit, on or about the second day of November, 1868, by an instrument in writing dated on that day, the plaintiff employed the defendant

9 herein, together with one William F. Hall, who was then in partnership with the defendant herein, and with him composed the firm of Hall and Manning, to transact their business as general agents in the State of New York, New Jersey, Delaware, Ohio, & Maryland, for the purpose of procuring and effecting assurance on the lives of individuals and securing applicants therefore who should be satisfactory to the plaintiffs, and for the purpose of collecting and paying over premiums when effected over the said ter'itory; that the terms of said contract will more fully appear in the copy hereto annexed and marked Schedule A, which defendant prays may be made part of this answer. That thereupon the said firm entered upon the execution of their part of the said contract, and faithfully, fully, and constantly fulfilled its requirements and agreements, devoting their entire time and attention to the said fulfillment, and that by their industry and care the business of the defendant was largely increased.

That thereafter, and on or about the 13th day of May, 1870, by

10 an instrument in writing dated on that day, the said William F. Hall sold and assigned to the defendant herein, and the defendant herein purchased, all his right, title, and interest in and under the said contract for the consideration and upon the terms which will more fully appear in the copy of such contract, which is hereto annexed and marked Schedule B, and which defendant prays may be made part of this answer.

That such transfer and assignment was made with the full concurrence and consent of the plaintiffs herein, and that thereafter defendant

went forward and prosecuted the business of general agent of the plaintiffs over the said ter'itory; that he devoted his whole time and energies to the prosecution of the said business, and carried it on with sustained success.

And that thereafter, being desirous of reorganizing the said agency and of securing to plaintiffs from any possible loss by reason of any indebtedness or liability they might have incurred on his behalf,

11 on or about the 17th day of September, 1870, by an instrument in writing dated on that day, entered into an agreement with the plaintiff, the terms of which will more fully appear in the copy of the same which is hereto annexed and marked schedule C, and which defendant prays may be made part of this answer. That by a statement in writing, also of said last-mentioned date, the plaintiffs signified their assent and acquiescence in the said last above-mentioned contract, a copy of which is hereto annexed and marked schedule D, and which defendant prays may be made part of this answer, but it was understood and agreed by and between the parties, plaintiffs and defendant, that the said first-mentioned contract was not thereby abrogated, but merely suspended for the three years or shorter time if the plaintiffs so elected, and that upon such termination the said first above-mentioned contract was again to resume its operation.

12 That thereafter defendant went forward with the business of such agency under said reorganization in good faith with all the energy in his power, although this was rendered doubly difficult by the negligent and grossly careless manner in which the business was conducted by the officers at the home office, defendant being continually hampered and delayed in his work of planting agencies by the said officers failing promptly either to ratify or reject his contracts with subagents; that he devoted his whole time to the business exclusively and carried it on with sustained success until the early part of June of the year 1871, when without notice to him of any kind the plaintiffs discontinued their connections with the defendant and forcibly ejected him from its office supplied for his use in the city of New York.

That defendant has not been disabled by sickness or otherwise from performing his duties under either of the above-named contracts, but that on the contrary he has at all times and in every respect fulfilled all his duties under the same and each of them.

13 Defendant further shows that since the execution of the first named contract multitudes of insurances have been effected, both by said firm and by defendant under its operation, and that by virtue of its terms the renewal commissions due and to grow due are part thereof wholly and the remainder partly the property of the defendant; that they have placed the business of the agency in the hands of a person unfriendly to defendant, who has to a large extent destroyed the business defendant built up; that they have collected and are collecting such renewal commissions as they mature, and that they are appropriating such renewal commissions to their own use; and that though payment of the same has been demanded by the defendant of the plaintiffs, that they refused and still refuse to pay the same or any part thereof, or to pay to the defendant the value of his property in the same, to the damage of the defendant in the sum of eighty-four thousand dol-

14 lars ($84,000), which defendant claims as a counter-claim against plaintiffs.

Defendant further alleges that there is due, owing, and unpaid to the defendant from the plaintiffs, under and by virtue of the terms of the contract of reorganization hereto annexed, and marked schedule C,

salary for the period extending from the 13th day of May, 1871, to the 13th day of May, 1873.

That payment of the same has been demanded by the defendant, but that plaintiffs refused to pay the same or any part thereof, to the damage of the defendant in the sum of ten thousand dollars ($10,000), which defendant claims as an additional counter-claim against the plaintiffs.

Defendant further alleges that the business of accruing life insurance policies is peculiar; that it depends for its existence upon the vigilance and skill of the agent; that it requires years of careful labor for its development; and that when it is established it becomes a valuable
15 interest; and that if disturbed by unfriendly interference it may and will be rapidly destroyed; that upon the assurances given by the plaintiffs of its support and their continuance of defendant in the office of general agent over the territory above set forth, and of their fulfillment of their contracts above set forth, and at their urgent solicitation, defendant was induced to purchase from the said Hall his interest in the said business as above set forth, paying him therefore large sums of money, as set forth in schedule B, and to carry on the whole business alone; that by reason of the action of the plaintiffs in expelling defendant from said agency the said business has been broken up; that the efforts of defendant for years in building up the same have been rendered useless as to new business subsequent to such expulsion, as also to the preservation of its old business, and the interest so purchased from the said Hall in like manner rendered valueless for such business, to the damage of defendant of twenty thousand dollars ($20,000),
16 which the defendant claims as an additional counter-claim against plaintiffs.

Wherefore defendant claims that the plaintiffs' narr. or declaration or complaint herein be dismissed, and that judgement be rendered for him against the plaintiff in the sum of one hundred and fourteen thousand dollars ($114,000) upon the counter-claims above set forth, as also the costs of this action.

GEO. V. N. BALDWIN,
Def't's Att'y.

17 SCHEDULE A.

This agreement, made the second day of November, one thousand eight hundred and sixty-eight, between the John Hancock Mutual Life Insurance Company, of Boston, Mass., an incorporation incorporated under the laws of the State of Massachusetts, of the first part, and William F. Hall and William S. Manning, copartners under the style of Hall & Manning, of New York City, in the State of New York, of the second part, witnesseth:

That the said party of the first part doth hereby appoint the said Hall & Manning as agent of the said party of the first part, for the purpose of procuring and effecting assurance on the lifes of individuals, and securing applicants therefore who shall be satisfactory to the said company, and for the purpose of collecting and paying over premiums on such assurance when effected.

This appointment is on the following terms and conditions, which are agreed to by each party hereto:

First. The compensation to be allowed said party of the second part
Commissions. for their services shall be as follows:

18	For the first year of assurance, per cent.	For the second and subsequent years of assurance, per cent.
1st. On the ordinary premiums upon all policies excepting those paid for by single payments	Twenty	Seven & one-half.
2nd. Said party of the first part also agreed to allow in addition to the regular commissions before specified for travelling and incidental expenses	Seven & one-half	Two & one-half.

The said party of the first will provide, at its own expense, offices within the ter'itory herein mentioned, and suitable furniture, as they may determine, and pay also for the care of the same.

The commissions upon policies, other than as above stated, shall be fixed by the officers of said company.

Commissions shall accrue only as the premiums are paid to the said company.

When premiums upon policies of said party of the second part are collected by other agents, the expense of collection, not exceeding one per cent., shall be deducted from the commissions to be allowed on said premiums, as before stated.

As to premiums collected by others.

19

The above regular & additional commissions shall continue to be paid to said party of the second part, their heirs or assigns, for the term of twenty-five years from the date of each policy, respectively, should any continue so long in force.

Continuance of commissions.

Second. The district to be assigned said party of the second part shall embrace the State' of New York, New Jersey, Delaware, Maryland, and Ohio.

District.

Within said district said party of the second part shall have the right to appoint sub-agents and medical examiners, subject to the approval of said company and to such rules as they may establish.

Sub-agents and medical examiners.

Third. The necessary expenses for medical examinations, for postage between the parties to this agreement, and for expressage upon documents and other things sent by said company to said party of the second part, shall be paid by said company. Further, said company shall furnish to said party of the second part, at their own proper costs and charges, a reasonable supply of blanks and circulars to enable them to carry on their business as agent as aforesaid. But no charges, other than as herein stated, or as shall hereafter be allowed by special permission of said company in writing, shall be paid by said company; and the said agent shall promptly remit to said company all moneys collected by them, on or before the fifteenth day of each and every month, making such deductions only as are herein allowed, and shall return according to its , to said company, all uncollected policies and premium receipts sent them for collection, and shall comply with all such reasonables rules as said company may have established, or shall hereafter establish, for the government of their agents.

What expenses to be allowed.

20

Prompt returns.

As to compliance with rules.

21 Fourth. The said agent shall act as the exclusive agent of the said John Hancock Mutual Life Insurance Company of Boston, so far as to give to the said company the preference of taking all such risks as they, the said agent, shall be able to offer to said company.

All risks to be first offered to the John Hancock.

Fifth. The aut'ority of said agent shall extend no further than is above

Extent of agent's authority.

stated. They shall not make, alter, or discharge any contract, or waive forfeitures, and shall receive no further remuneration for any service than is above stated. No policy fee shall be charged on them, received by them, shall be paid to said company.

Sixth. The said agent shall be entitled to no commissions on insurances, unless, in the opinion of the board of directors, the same were fairly effected through their instrumentality, and by them introduced to said office; and in all cases where the claim of the said agent to said commissions is disputed by the officers

Settlement of disputes as to commissions.

22 of the company, or by other agents or persons, the decision of the board of directors, expressed by a vote of the board at any regular meeting, shall be binding and conclusive to such claim.

This agreement is to cover and apply on all renewals of business obtained by said Hall & Manning since Sept. 1, 1867, but shall apply to first commissions only since November 1, 1868, and all renewal commissions are hereby pledged to the company as security for any indebtedness of said Hall & Manning to the company existing at any time.

This agreement shall continue in force for three years from the first day of September, 1867, and after that may be terminated by either party thereto giving the other notice in writing six months in advance of his or their desire to terminate it.

As to terminating contract.

In witness whereof the party of the first part hath caused

23 this agreement to be duly executed, and the party of the second part hath hereunto set their hand and seals, this twelfth day of December, A. D. 1868.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,
By GEO. P. SANGER, *Pres't.*

Countersigned:
GEO. B. AGER, *Sec'y.*

WM. F. HALL. [L. S.]
W. S. MANNING. [L. S.]

Sealed and delivered in the presence of—
C. J. LAWTILL, as to W. F. Hall & W. S. Manning.

[U. S. rev. st'p, 5 c.]

[SEAL.]

24 SCHEDULE B.

In consideration of nine thousand dollars to me paid by William S. Manning, of New York, the receipt of which is hereby acknowledged, I do hereby assign, transfer, and set over unto the said Manning all my right, title, and interest in the within contract on the express consideration that said Manning shall assume all the indebtedness of the firm of Hall and Manning, of whatever name or nature, and that he will hold me harmless against any claim or costs which may arise in connection with the business of the said firm, which is this day dissolved, and I hereby agree not to cause or influence any policy obtained by said firm to be surrendered or lapsed.

In witness whereof I have, this thirteenth day of May, A. D. 1870, set my hand and seal at, New York City.

W. F. HALL. [L. S.]

[U. S. rev. st'p 15 cts.]

Signed, sealed, and delivered in presence of—
JOHN ANDERSON.

Approved:

GEO. B. AGER, *Sec'y.*

25 SCHEDULE C.

[Office of the John Hancock Mutual Life Ins. Company. Geo. P. Sanger, pres't; Geo. P. Ager, sec'y.]

BOSTON, *Sep't* 17, 1870.

Hon. GEO. P. SANGER, *Pres't:*

DEAR SIR: In reorganizing the New York agency, made necessary by the late change, and the purchase by me of the interest owned by Mr. W. F. Hall, my late associate, I propose the following terms: The company to employ me as their general agent, to be located in the city of New York, for the district now under the control of the New York agency. The compensation to be $5,000 per year for the period of three years from the date of the dissolution of the firm of Hall and Manning. I to devote my whole time to the service of the company in obtain application for insurance, and to appoint such agents as the company may desire. The contracts of sub-agents to be made directly with the company at a commission 25 & 7½ per cent., with proper bonds for
26 the faithful execution of the requirements named in such contract. The salary of the clerk in the New York office to be regulated and paid by the company. The company to pay the office rent and expenses as heretofore. My travelling expenses while working for the company in locating agents or while acting under their orders shall be paid by the company; said expences shall not exceed ten dollars per day, I to keep a correct record of all expences, to be submitted with voucher to the company; the renewals of the old business of W. F. Hall and Hall & Manning to be collected by me, and I am to receive the renewals commissions which such renewals are entitled to under the contract of Hall and Manning, and pay the same to the company towards the indebtedness. I to pledge my entire interest in the above renewals for the faithful return of all money collected by me to the company.

Yours, truly,

W. S. MANNING.

27 SCHEDULE D.

[Office of the John Hancock Mutual Life Ins. Company. Geo. P. Sanger, pres't; Geo. P. Ager, sec'y.]

BOSTON, *Sept.* 17, 1870.

By assent of committee on agencies, accepted with the proviso that the company may terminate the contract at any time within the three years if Mr. Manning is disabled by illness or otherwise from the performance thereof.

JOHN HANCOCK MNTUAL LIFE INS. COMPANY,
By GEO. P. SANGER, *Pres't.*

BOSTON, *Sept.* 17, 1870.

Assented to—

W. S. MANNING.

28 (Indorsed:) U. S. circuit court. William S. Manning ads. The John Hancock Mutual Life Insurance Company. Copy. Answer. Geo. V. N. Baldwin, def't's att'y., No. 79 Cedar st., N. Y. City.

29 U. S. circuit court, southern district of New York.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company
ag'st
WILLIAM S. MANNING.

First. The plaintiff in the above-entitled action, for an amended reply to so much of the new matter in the defendant's answer as is alleged by way of counter-claim, deny each and every allegation thereof.

Second. And for a second and distinct reply to such new matter, the said plaintiffs allege that after the making of the alleged agreements and contracts mentioned in said answer and before the commencement of the present action, the said defendant assigned, transferred, and set over to the plaintiffs, for a valuable consideration, all his right, title, and interest under the said agreements, and all the commissions due or to grow due to him by reason of said agreements or any of them, as security to the plaintiffs against certain liabilities theretofore as-
30 sumed and incurred by the plaintiffs for and on behalf of said defendant, and for certain debts due and owing by the defendant to the plaintiffs, and that said defendant is still largely indebted to the plaintiffs for moneys due and owing by him to them, which debts were created by the payment of moneys by the plaintiffs under and in consequence of the liabilities aforesaid and otherwise, and that the said plaintiffs have the right, by virtue of the assignment aforesaid, to collect and receive all the commissions alleged by the defendant in his said answer to belong to him, and to apply the same to the payment of the debts due to them as aforesaid.

SCUDDER & CARTER,
Atty's for Pl'ffs.

31 (Indorsed:) U. S. circuit court, southern dist. of N. Y. The John Hancock Mutual Life Insurance Company ag'st William S. Manning. Amended reply. Scudder & Carter, pl'ffs' att'ys.

Due & timely service of a copy hereof is hereby admitted.
Dated May 1st, 1875.

Served on Geo. V. N. Baldwin, he having refused admission.

32 Circuit court U. S. for the southern district of New York.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company
vs.
WILLIAM S. MANNING.

Charge is thereupon given by the court to the jury, who retire under charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiffs in the sum of ten thousand nine hundred and eighty-two dollars and seventy-two cents, and so they say all.

Mr. Baldwin makes a motion for a new trial on the minutes.

Order, That defendants have a stay of 30 days in which to make a case, with liberty to turn the same into a bill of exceptions.

An extract from the minutes.

KENNETH G. WHITE, *Clerk.*

33 United States circuit court, southern district of New York.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company
against
WILLIAM S. MANNING.

The issues in the above-entitled action having come on for trial at a circuit court of the United States held in the city of New York on the ninth day of November, 1875, before the Hon. W. J. Wallace, judge, and a jury, and the jury having rendered a verdict for the above-named plaintiff for the sum of ten thousand nine hundred and eighty-two & $\frac{72}{100}$ dollars: Now, on motion of Scudder & Carter, plaintiffs' attorneys, it is ordered and adjudged, and that The John Hancock Mutual Life Insurance Company, the plaintiff above named, recover from William S. Manning, the defendant above named, the said sum of ten thousand nine hundred and eighty-two & $\frac{72}{100}$ dollars, together with the sum of one hundred & ninety-two $\frac{20}{100}$ dollars interest, together with the sum of one hundred & forty-seven $\frac{95}{100}$ dollars costs, making together the sum of eleven thousand three hundred & twenty-two & $\frac{81}{100}$ dollars, and that the said plaintiffs have execution therefor.

Dated February, 1876.

Judgement signed this ninth day of February, 1876.

R. E. STILWELL,
Dep. Clerk.

34 (Indorsed:) C. L. D. No. 3, p. 480. U. S. circuit court. The John Hancock Mutual Life Ins. Co. ag'st William S. Manning. Judgement roll. Amount & interest, 11.174.92; costs, 147.95—11,322.87. Scudder & Carter, pl'ffs' att'ys. Filed Feb'y 9, 1876.

35 Circuit court of the United States for the southern district of New York.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company
ag'st
WILLIAM S. MANNING.

Afterwards, to wit, at a circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-house thereof, in the city and county of New York, on the 8th day of November, one thousand eight hundred and seventy-five, before William J. Wallace, esquire, circuit judge appointed to hold said circuit court according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of the city and county of New York aforesaid for that purpose duly empannelled, good and lawful men of the said city and county, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys afore-
36 said, and the jurors of the jury aforesaid empanelled to try said issue being called also came, and were then and their in due manner chosen and sworn to try the same issue.

And upon the trial of that issue, the counsel for the said plaintiff, to maintain and prove the said issue on his part, gave evidence tending to show an indebtedness arising in part from moneys collected and re-

ceived by defendant as agent for plaintiff in several items on behalf of the plaintiff against the defendant, amounting in the aggregate to $14,151\frac{43}{100}$ and interest on the same, amounting in the aggregate to the sum of $5,045\frac{27}{100}$, making a total of $19,196\frac{17}{100}$, and thereupon rested.

Defendant offered in evidence the original contract made between the plaintiff and the firm of Hall & Manning, marked Ex. Def'ts A 1.

(Take it in.)

Also, assignment by Hall & Manning to plaintiff, marked Def't's Exhibit A 2.

(Take it in.)

37 Also, assignment by Hall to Manning, marked Def't's Exhibit A 3.

(Take it in.)

Also, a proposition in the form of a letter from defendant to plaintiff, marked Defendant's Exhibit B 1.

(Take it in.)

Also, assent of the plaintiff to the proposition, marked Def't's Ex. B 2.

(Take it in.)

Defendant then offered evidence to show that the indebtedness due from him to plaintiff at the time of the trial did not exceed a total of $10,982.72.

Defendant then offered to show that a set-off existed in his favor against the plaintiff for commissions collected and received by the plaintiff from May 1st, 1871, to December 23rd, 1871, and interest thereon to the time of the trial.

And it being admitted that defendant's attorney had served upon plaintiff's attorneys the following notice.

(Take in notice to produce.)

38 And the books and papers necessary to prove the amount of renewal commissions received by plaintiffs from policies obtained through defendant's agency during the last-mentioned period not having been produced by plaintiff, defendant offered to sustain his offsets by the following testimony (commencing at line 5, page 43, and continuing to and including the whole of page 54 of the stenographer's minutes, viz):

Q. (Handing witness a paper.) What is that paper handed to you?

A. It is a memorandum of the entire policies and premiums in force up to June 2, 1871.

Q. By whom was that made?

A. Mr. John R. Anderson, the bookkeeper.

Q. Under your direction?

A. Yes, sir.

Q. Give a statement from your recollection, refreshed by any memorandum that you may use, of the policies in force.

The WITNESS. I find that adding up the total amount of policies in force, there was in force upon which I had the right to charge five per cent. $87,000. And the amount that I had the right to charge

39 *the* per cent. on was $40,000.

Q. What do you mean by these amounts?

A. I mean the total amount of premiums in force.

Q. Do you mean the annual premiums?

A. Yes, sir.

Q. Then you mean to say that there were in force at that time policies upon which the annual premiums would be $87,000.

Q. You are required to state every polic*ie*, the name of the party in-

sured, the amounts insured, and the amount of annual premiums, so far as you can remember it, without looking at that paper, and then when your memory is exhausted you may refresh it by looking at the paper.

A. I cannot remember what the names were that the parties were insured under, and I cannot specify the amount on each of the premiums.

By Mr. Emott:

Q. Can you by refreshing your recollection or referring to that paper?

A. I can only do so in this respect; the amounts due from each of the subagencies, which were all under me.

Q. What is that paper?

40 A. It is a list of the entire policies in force, made up in total.

Q. What is that column of names?

A. The names of agencies to whom these premiums belonged.

Q. Not the names of the persons insured?

A. No, sir.

Q. Then what you would be able to state would be the amount due to you from the policies, the amount due upon the policies in the hands of each one of the agents whose names appear on that paper?

A. Undoubtedly; yes, sir.

Q. And that is as near as you can come to giving a list of the policies?

A. Yes, sir.

Q. Have you any books?

A. No, sir.

Q. Any list of policies or vouchers which were in your possession at the time?

A. Nothing of the kind; they took possession of everything.

Q. Where did that list come from?

A. It came from the books. I had it myself in my possession.

Q. That has been in your possession since?

A. Yes, sir.

Q. You kept that?

A. Yes, sir.

Q. Would the books of the plaintiff in this action give the names of the various holders of these policies?

41 A. Yes, sir.

Q. Would they give also a statement of the time when the policy was taken—the length of time each policy was taken for?

A. Yes, sir.

Q. And all the data in regard to it?

A. Yes, sir.

Q. Without the books, the statement of the amounts in the hands of agents is the best evidence in your possession of the amount due?

A. Yes, sir.

Q. Now go on and state the amount.

A. I find from this list of premiums in force that there were $87,725.82 upon which I was entitled to charge five per cent. on all policies of every kind and description.

Q. That amount of $87,000 I understand to be the amount of annual premiums received by the company upon which you were entitled to a commission of five per cent.?

A. Or collected each year.

Q. Upon which you were entitled to five per cent.?

A. Yes, sir.

Q. In consequence of what clause of the contract do you refer to?

42 A. In consequence of having sold a half interest to the company or $33,000.

Q. Reserving the other half?

A. Yes, sir.

By the Court: Do you mean to say that those amounts were in the hands of agents or had been forwarded to the company?

Mr. EMOTT. What he means to say is this, that that is the gross amount of the annual premiums on the class of policies upon which premiums he would be entitled to this five per cent., and that those policies were all in force at the time he was removed.

The WITNESS. Then there is a further amount of $40,548.49 upon which I was entitled to charge ten per cent.

By Mr. Emott:

Q. What clause in the contract does that come under?

A. The contract that entitled me to 27½ per cent. on first commissions and ten per cent. on renewals.

Q. You mean to say that this belonged to a class of policies in which you had not sold your half?

A. Yes, sir.

Q. They were taken subsequent to September, 1869?

A. Yes, sir.

43 Q. This first class were policies issued prior to September, 1869, and the second class of policies were policies issued subsequent to September, 1869?

A. Yes, sir.

Q. That is the distinction?

A. Yes, sir.

Q. What is the amount of your annual commissions at these rates, upon these premiums?

A. I find the sum of $8,391.14 annual income from these commissions.

Q. These premiums were received, if I understand you, were collected by the agents, the subagents whose names appear in that list?

A. Yes, sir, some of them; some of those were not in——

Q. Well, they were received at different periods through the year from time to time?

A. Yes, sir.

Q. And remitted to you, and by you remitted to the company?

A. Yes, sir.

Q. That was the general practice, was it?

A. Yes, sir.

Q. Have you computed the amount which would be due to you on the 23rd of December, 1871, the time of the commencement of this

44 suit, on account of these commissions?

A. Yes, sir.

By the Court:

Q. Would the books show when the premiums were payable?

A. Yes, sir.

Q. How do you know it?

A. I reported, or caused it to be reported by my bookkeeper; on my register a regular record was kept of all the policies.

Q. The books, then, contain an abstract of the terms of these policies?

A. Yes, sir.

The WITNESS. By computing the commissions accruing from the time I was dismissed up to the 23rd of December—that is, from June 2, 1871, to December 23rd, 1871—I find it to be about $4,754.97. I know from my own knowledge that the heaviest portion of this business was had, or about to be had, in the months of November and December, for the reason that we made most effort to take all the business we could in those months—the heaviest portion of the business. Therefore, if there is any discrepancy, it would be in favor of the company.

Q. Have you computed the interest on that amount to the present time?

A. Yes, sir.

45 Q. What is that amount?

A. $1,275.92.

Defendant's counsel offers to prove the interest on the amount of $8,391.14, which witness says was the annual commissions which he would be entitled to on these outstanding policies for each year from May, 1871, down to the time of the trial, which would be three years and six months' interest on $8,791.14 for the year ending 1872, two years and six months' for the year ending 1873, and one year and six months' for the year ending 1874, and six months' interest on the present year.

Plaintiff's counsel objects; evidence excluded; defendant's counsel excepts. Defendant's counsel offers to prove by this witness the probable duration or continuance of these policies of which the witness has spoken, based upon the tables of mortality and the experience of actuaries in life insurance business, for the purpose of computing or enabling the jury to assess the gross value of his interest in these outstanding policies.

Plaintiff's counsel objects.

46 The court excludes the evidence offered, except so far as it might tend to show the condition of things at the time of the commencement of the suit.

And thereupon defendant rested.

Plaintiff then gave evidence to show that defendant was rightfully removed by plaintiff from his position as its agent becaus' of the misconduct and misfeasance of the defendant in the duties of his employment, and was not entitled to the renewal commissions constituting the offset claimed by the defendant.

Evidence was given by the defendant on his cross-examination tending to show that most of the policies upon which premiums were recovered at the New York agency were procured by the various subagents in the district attached to that agency, and that such subagents usually collected the premiums and remitted them to the principal agent in New York, and that such subagents were compensated by a commission allowed to them, which commissions were paid by Hall and Manning

47 when that firm had charge of the New York agency, and by Manning after his purchase of Hall's interest. This commission thus paid to subagents, so far as the first premium went, varied, being sometimes twenty per cent. and sometimes twenty-five per cent. of such first premium; and sometimes the whole of the commission on the first premium stipulated by the contracts to be allowed by the plaintiffs to the New York agents was by such agents allowed to their subagents upon renewal premiums; the commission allowed to the subagents by the New York agents was usually five per cent. of the premium.

The case was then closed.

The court thereupon charged the jury, among other things, that if the plaintiff was not justified in removing the defendant from its em-

ploy, he was entitled to remain in charge of the plaintiff's office and to supervise the collection of the renewal premiums; and if by the action of the plaintiff he was prevented from such access to the books and papers as was requisite to enable him to collect them, he was
48 absolved from all duty in that behalf, and under those circumstances the burden of proof as to the sum received by plaintiff arising from these renewals would be measurably changed. If, by his own conduct, defendant rendered the action of plaintiff in removing him necessary, his rights against and obligations to the plaintiff would be precisely those that would have existed if he had not been removed at all. In such case, before he could recover of plaintiff his portion of the renewals, it would be incumbent upon him to show, not only how many policies had been taken by Hall & Manning, and the premiums which were due upon them, but also that the premiums had been paid to plaintiff by the persons under obligation to pay them. His proof in this regard would not satisfy the requirements of the law if it fell short of showing the amount actually received by the company.

It would not suffice to show that a certain sum was collected merely. But if by its wrongful act plaintiff deprived him of the means of collecting the premiums, then plaintiff cannot be heard to complain if defendant resorts to the best evidence which is in his power to produce; and therefore, when he has shown that renewal premiums to
49 a certain sum were due or payable, at the time when he was removed, upon life policies, sums which because of its own act plaintiff was bound to collect if collectible, defendant is entitled as against plaintiff to the presumption that these sums were collected as they became due, and therefore the burden would rest upon plaintiff to show that policies had lapsed, or that, without any fault on its part, it had been unable to collect the renewal premiums.

This result does not follow because plaintiff refuses upon defendant's notice to produce its books and papers upon the trial to enable him to make proof of the sum plaintiff has received. If they were justified in removing him they have the right to require him to prove his case to the same extent as he would be obliged to prove if he had not been removed at all, that is, to satisfy you by legal evidence as to the sum plaintiff has received.

Now, gentlemen, I have held in this case that the defendant, at the time he was removed by plaintiffs from their employ, was entitled and had a vested right to the premiums accruing under the agreement with Hall & Manning, and therefore I hold that the act of the plaintiff in removing him from their employ did not affect that right. I charge as a matter of law, whether that removal was rightful or wrongful, whether the company was justified in removing him or not, that he was
50 entitled to the renewal commissions. But evidence has been given to show that if he had remained in possession and collected these premiums himself it would have been at expense to himself—commissions would necessarily have to subagents for collecting them. Now if the company wrongfully removed him, then they have taken upon themselves the duty of collecting these premiums and have absolved him from the expense and trouble of collecting them. The question is, in the first place, are you satisfied that the defendant was justifiably removed? If he was, then there is no proof for your consideration as to the amount of the renewals, which he claims to be in the hands of the plaintiff. If he was not justifiably removed, then it is for you to say, upon the evidence in this case—the best evidence which the case affords—what is the amount received or should have been received by

the company during the period between the time of his removal and the commencement of this suit.

Defendant's counsel thereupon excepted to so much of the charge as was to the effect that if the defendant was rightfully dismissed
51 from the employ of the plaintiff no evidence is to be taken into consideration upon the question of the defendant's commissions.

The jury thereupon rendered a verdict for the plaintiff for $10,982.72.

And the said circuit judge under the charge, and with the directions aforesaid, left the aforesaid issue, and the evidence so given on the trial thereof as aforesaid, to the said jury; and the jury aforesaid then and their gave their verdict for the said plaintiff, and $10,982.72 damages. And inasmuch as the said several matters, so produced and given in evidence on the part of the said defendant and by his counsel aforesaid objected and insisted on, as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said defendant did then and there propose their aforesaid exceptions to the opinions of the said circuit judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so pro-
52 duced and given in evidence on the part of the said defendant, as aforesaid, according to the form of the statute in said case made and provided; and thereupon the said circuit judge, at the request of the said counsel for the said defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the third day of May, in the year of our Lord one thousand eight hundred and seventy-six.

WM. J. WALLACE,
Judge U. S. District Court.

53 (Indorsed:) U. S. circuit court, southern district N. Y. The John Hancock Mutual Life Ins. Co. ag'st William S. Manning. Exceptions on appeal. Geo. V. N. Baldwin, att'y for def't & app., 19 Cedar st., New York. Filed May 9th, 1876.

54 Circuit court of the United States of America for the southern district of New York, in the second circuit.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, defendant in error,
vs.
WILLIAM S. MANNING, PLAINTIFF IN ERROR.

Know all men by these presents that we, William S. Manning, of the city of Newburgh, State of New York, and Edward C. Homans, of the city, county, and State of New York, are held and firmly bound unto the above-named The John Hancock Mutual Life Insurance Company, in the sum of two hundred and fifty dollars, to be paid to the said The John Hancock Mutual Life Insurance Company, for the payment of which, well and truly to be made, we bind ourselves, and each of us our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 16th day of February, in the year of our Lord one thousand eight hundred and seventy-six.

55 Whereas the above-named William S. Manning has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named William S. Manning shall prosecute said writ of error to

effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WM. S. MANNING. [L. S.]
E. C. HOMANS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 16th day of February, 1876, before me.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

56 Edward C. Homans, being duly sworn, doth depose and say that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities, besides property exempt by law from execution.

E. C. HOMANS.

Sworn to this 16th day of February, 1876, before me.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. of N. Y.

(Endorsed:) U. S. circuit court. The John Hancock Mutual Life Ins. Co., def't in error, vs. William S. Manning, pl'ff in error. Bond for costs on writ of error. Geo. V. N. Baldwin, proctor for pl'ff in error, No. 79 Cedar st., New York.

The within bond approved as to form and sufficiency of sureties. Feb'y 18, 1876.

WM. J. WALLACE.

57 UNITED STATES OF AMERICA, *ss:*

To the John Hancock Mutual Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein William S. Manning is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 18th day of February, in the year of our Lord one thousand eight hundred and seventy-six.

WM. T. WALLACE,
Judge U. S. Dist. Court.

58 (Indorsed:) U. S. circuit court. The John Hancock Mutual Life Ins. Co., def't in error, vs. William S. Manning, pl'ff in error. Citation. Filed Feb'y 22, 1876. Geo. V. N. Baldwin, att'y for pl'ff in error, No. 79 Cedar st., N. Y.

Due service of a copy of a citation of which the within is a copy is hereby admitted.

Dated New York, Feb. 18, 1876.

SCUDDER & CARTER,
Att'ys for Def't in Error.

(Indorsement on cover:) No. 277. William S. Manning, pl'ff in error, vs. The John Hancock Mutual Life Insurance Co. S. New York C. C. U. S. Filed 18th October, 1876.

REC. 277—2

ADDITION TO RECORD 57.

U. S. Supreme Court.

WILLIAM S. MANNING, PLAINTIFF IN ERROR,
agt.
THE JOHN HANCOCK MUTUAL LIFE INSURANCE Company, defendant in error.

It is hereby stipulated and agreed that in the record herein, on page eleven thereof, the original contract between the parties hereto, marked Ex. Def't's A 1, is the same as schedule A, on page 5, annexed to the answer; that the assignment to plaintiff in error, marked Def't's Exhibit A 2, is the same as schedule B, on page 7, annexed to the answer; that the letter to said company from plaintiff in error, marked Defendant's Exhibit B 1, is the same as schedule C, on page 8, annexed to the answer; that the assent, marked Def't's Ex. B 2, is the same as schedule D, on page 8, annexed to the answer; that the words "take it in," following said exhibits, be erased, and in lieu thereof the respective exhibits be deemed inserted or properly referred to the said schedules, and that the record be deemed amended accordingly.

Dated New York, 27th Dec., 1879.

HENRY J. SCUDDER,
Of Counsel for Def't in Error.
H. H. ANDERSON,
Of Counsel for Pl'ff in Error.

(Endorsed:) Sup. Court U. S., 1879, Octo. term, No. 57. William S. Manning, pl'ff in error, vs. The John Hancock Mutual Life Insurance Company. Stipulation to correct record. Filed 31 January, 1879.

OFFICE SUPREME COURT U. S.
FILED
MAR 8 1880
D. W. MIDDLETON, Clerk.

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 57.

WILLIAM S. MANNING, PLAINTIFF IN ERROR,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Supreme Court

OF THE UNITED STATES.

WILLIAM S. MANNING,
Plaintiff in error,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Defendant in error.

No. 57.—*Points for Plaintiff in error.*

STATEMENT OF FACTS.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The complaint was filed the 30th day of March, 1872. It alleges indebtedness of plaintiff in error to defendant for moneys had and received to the amount of $30,000.

The answer denies indebtedness, and sets up counter-claim growing out of relations that had previously existed between the parties, as follows: Plaintiff, a Massachusetts life insurance corporation, employed Hall & Manning as their general agents for New York and other States, under a contract under seal dated the second day of December, 1868, to secure applications for life insurance, which appears in the Record, Schedule A, page 5. By this contract plaintiff agreed to pay said firm twenty-seven and one-half per cent. on the first year's premiums of all new policies procured then, and ten per cent. for all subsequent years for *twenty-five years*. If plaintiff or other agents collected the premiums, one per cent. should be deducted.

On the 13th day of May, 1870, Hall sold out his interest to defendant with plaintiff's approval.

On the 17th day of September, 1870, a new arrangement was made by the parties by which plaintiff in error was thenceforward to receive $5,000 per annum for his services, the commissions were to be to sub-agents twenty-five and seven and one-half per cent., "the renewals of the old business of Hall and Hall & Manning to be collected by me (plaintiff in error), and I am to receive the renewal commissions which such renewals are entitled to under the contract of Hall & Manning"; the contract to be terminated at the option of the company at any time within three years.

Plaintiff in error also counter-claimed two years' salary and $84,000 commissions.

The company replied that the plaintiff in error had assigned this contract to it as collateral security for his indebtedness (Record, p. 9).

The cause came on to be tried in the city of New York before Mr. Justice WM. J. WALLACE, on the 8th day of November, 1875. It then appeared that the transfer referred to in the counter-claim was of only one-half of the commissions, being five per cent. of the annual premiums (Record, p. 13).

The company on the trial then gave evidence tending to prove an indebtedness of $19,196.17 (p. 11, fol. 36).

The defendant gave evidence tending to prove that such indebtedness was only $10,982.72 (fol. 37).

The jury rendered a verdict for the Company for $10,-982.72 (fol. 51).

The company proved that on or about the 1st day of June, 1871, they discharged Mr. Manning; and also gave evidence tending to prove that such discharge was lawful, which he controverted.

Defendant then offered to prove that a set-off existed in his favor against the plaintiff for commissions collected and received by the plaintiff from May 1, 1871, to December 23, 1871, and interest thereon to the time of trial (fol. 37).

Defendant proved that the commissions earned under the contract and due to him amounted in the previous year to the sum of $8,391 14
being five per cent. on $87,725.82.... $4,386 29
and ten per cent. on $40,048.49..... 4,004 85
$8,391 14

He then showed to the Court that he had notified the

company to produce their books for the purpose of proving the amount of premiums they had collected from the first of May to the first of December, 1871, on the policies in which he had a vested right. The company refused to produce such evidence.

The defendant then proved, without objection, that all the policies in question were in force on the day of his discharge; that the amount of the commissions on the premiums on said policies that came due before the first of December, 1871, was $4,754.97; and then rested his case.

This evidence was admitted to be evidence of a character to go to a jury, for no motion to dismiss the complaint was made, and no exception was taken to the submission of the case to the jury.

Thereupon the Court did submit the case to the jury under a charge that contained the following instruction:

"Whether the removal of defendant from plaintiff's employ was rightful or wrongful, whether the company was justified in removing him or not, *he was entitled to the renewal commissions* (fol. 59). If by the action of plaintiff he was prevented from such access to the books and papers as was requisite to enable defendant to collect the premiums, he was absolved from all duty in that behalf (fol. 48). If by its wrongful act plaintiff deprived defendant of the means of collecting the premiums, then plaintiff can not be heard to complain if defendant resorts to the best evidence which is in his power to produce; and therefore, when he has shown that renewal premiums to a certain sum were due or payable, at the time when he was removed, upon life policies, sums which because of its own act plaintiff was bound to collect if collectable, defendant is entitled as against plaintiff to the presumption that these sums were collected as they became due, and therefore the burden would rest upon plaintiff to show that policies had lapsed, or that without any fault on its part it had been unable to collect the renewal premiums (fol. 49). If the company wrongfully removed him, then they have taken upon themselves the duty of collecting those premiums, and have absolved him from the expense and trouble of collecting them. If he was not justifiably removed, then it is for you to say upon the evidence in this case—*the best evidence the case affords*—what is the amount received or should have been received by the company during the

period between the time of his removal and the commencement of this suit" (fol. 50).

All this was assented to and accepted by the respective counsel as a correct statement of the law.

The Judge in addition thereto said:

"If the plaintiffs were justified in removing defendant they have the right to require him to prove his case to the same extent as he would be obliged to prove it if he had not been removed at all, that is, to satisfy you by legal evidence as to the sum plaintiff has received (fol. 49). If the defendant was justifiably removed, then there is no proof for your consideration as to the amount of the renewals which he claims to be in the hands of the plaintiff."

And to this part of the charge the defendant then and there duly excepted.

After having shown by his contract that he was entitled to his commissions for twenty-five years, and having given evidence tending to prove that he had been wrongfully removed, he then offered to prove the probable duration or continuance of these policies based upon the tables of mortality and the experience of actuaries in life insurance business for the purpose of computing or enabling the jury to assess the total value of his interest in these outstanding policies, which was excluded (Record, p. 14), except so far as it might tend to show the condition of things at the time of the commencement of the suit.

The defendant also offered to prove the interest on the annual commissions to which he was entitled on the outstanding policies. This evidence also was excluded, and defendant then and there duly excepted.

Thereupon the jury rendered a verdict in favor of the said company, and judgment was entered thereon on the 9th day of February, 1876, for the sum of $11,322.87.

From this judgment the defendant in the trial Court took a writ of error, and upon the writ the case now comes to this Court.

Assignment of Error.

1st. The learned Judge erred in his charge to the jury in instructing them that if they were satisfied that the defendant was justifiably removed, then there was no proof for their consideration for the amount of the renewals which he claimed to be in the hands of the company.

2d. The learned Judge erred in excluding the evidence of the amount of interest due upon the renewal commissions which had been received by said company belonging to the plaintiff in error.

3d. The learned Judge erred in excluding the evidence offered on behalf of plaintiff in error to prove the probable duration or continuance of the policies upon which plaintiff in error was entitled to commissions, based upon the tables of mortality and the experience of actuaries in life insurance business for the purpose of computing or enabling the jury to assess the gross value of this interest in these outstanding policies.

POINTS.

First Point.—The charge of the Judge in its main proposition was correct and is to be deemed the law of this case.

First.—It is the law of this case.

Whenever a proposition of law is enunciated by a Court and assented to by the parties to the litigation, it can not thenceforward be challenged or criticised by either counsel.

Second.—It was correct and sound law.

No one can dispute that under that contract defendant is entitled to renewal commissions for twenty-five years on all outstanding policies affected by him before the 2d day of June, 1871, without regard to the question of discharge.

Nor can it be disputed that if by the action of plaintiff, defendant was prevented from such access to the books and papers as was requisite to enable defendant to collect the premiums, he was absolved from all duty in that behalf.

For the law would never lay upon any defendant the burden of collecting premiums when the plaintiff deprived him of the means of making such collection.

Nor can it be disputed that the plaintiff did take and keep possession of all the said books and papers and did deprive defendant of all access thereto. The defendant testified without contradiction that nothing whatever was left in his custody, that plaintiff took possession of everything. When defendant demanded the production of the books and papers they were refused. Thus the facts established the hypothesis upon which the charge was based, that by the action of plaintiff, defendant was prevented from all access to the books and papers, and hence followed as the inevitable conclusion that defendant was absolved from all duty in respect to the collection of the premium.

Nor can it be disputed that due, timely and sufficient notice was given by defendant to plaintiff to produce the books and papers necessary to prove the amount of renewal commissions received by plaintiff from policies obtained through defendant's agency from May 1st, 1871, to December 23d, 1871, and that plaintiff failed to produce the same.

Nor can it be disputed that this failure to produce gave defendant the right to give inferior evidence to establish the facts that would have been established against plaintiff's by the books themselves.

Nor can it be disputed that the evidence given under this rule was "*the best evidence the case afforded.*"

There is no rule of limitation in respect to the nature of secondary evidence. It is to be governed by the peculiar nature and circumstances of each case. What were the facts and circumstances here? One thing especially is to be noticed, that the plaintiff having commenced the action with an unverified complaint, was enabled to put in an unverified reply, and therein and thereby to deny the counter-claim set up in the answer.

In the case at bar, as the books and papers of the plaintiff were at Boston, and beyond the jurisdiction

of the Court, the defendant had no power to compel the production of such books and papers. He had no copy of them. He had not been the collector of any of the moneys. He had not even the names of the policy-holders. No one accounted to him for the moneys paid.

Now, the Court could never lend its sanction to such an attempt to defraud the defendant or defeat him in the collection of a just claim, and therefore the Court said that defendant had given "the best evidence the case afforded."

It was contemplated by both parties that the policies in question would be of long duration when they fixed a limitation of twenty-five years for the commissions, and that circumstance combined with the undisputed statement that all these policies were in force May 1st, and the absence of all proof by the plaintiff that any of these policies had lapsed, and which proof could have been so readily furnished if such were the fact, authorized the Court in submitting to the jury the amount that they believed defendant was entitled to on that counter-claim.

It will be observed that the Judge did not instruct them they were to find the amount stated. On the evidence he left them to say what amount they believed had or would have been paid; they were to assess the damages with the light that all the evidence on the part of defendant and the absence of counter-evidence on the part of plaintiffs afforded them.

In Koehler *v.* Adler, unreported, an action was brought in the Superior Court of the City of New York, against an administrator to recover a loan of $2,500, made to defendant's intestate, on the 30th day of January, 1873; the defence was that the loan was not made by defendant individually, but by a corporation of which he was treasurer. Defendant served plaintiff with notice to produce all checks and drafts made by the company, or by himself as treasurer, and the books of the company; failing to obey which, a copy of a bill of particulars in another action

made by plaintiff's bookkeeper was received in evidence, from which it appeared that on the same day there was a transaction on the books of the company of the same amount; the Court on this directed a verdict for plaintiff, but the Court of Appeals reversed on the ground that the case should have gone to the jury.

Second Point.—The rules of evidence in respect to the admissibility of testimony on the question of the amount of plaintiff's indebtedness to defendant can not be affected by such extraneous considerations as the justifiable or injustifiable removal of an employee.

There are three methods which the law recognizes as sufficient to establish indebtedness.

First.—By proof of the fact by a party or eye-witness to the transaction.

Second.—By admissions, written or oral, of the party against whose interest such admissions are made.

Third.—By secondary evidence of such matters.

For the admission of such secondary evidence a foundation must be laid either by proof that the writing is lost, or is in existence and in possession of an adverse party, and that notice to produce such writing has been given.

Now, in the Record (page 11) it appears that notice to produce the account between the parties was given, and the books and papers demanded were not produced by the Company in whose possession they were. It therefore entitled defendant to give secondary evidence.

This the Judge admitted to be correct *in case the discharge was unlawful*, but he in effect further instructed the jury that there was an exception to this rule in case the discharge was lawful.

Here was a grave and serious error, that resulted in the defeat of justice.

The jury was erroneously instructed that there was no evidence before them to warrant any allowance of commissions in case they found that the Company had lawfully and for sufficient cause discharged the plaintiff in error.

Originally there were two questions in this case.

First.—The amount of the commissions that had been earned, and were actually due at the time of the trial.

Second.—The value of the future commissions treating the contract as entire.

The learned Judge, by his rulings upon the trial, had excluded from the consideration of the jury the second question.

The first remained.

The evidence had been given without objection. It showed that from the 2d day of June, 1871, to the 23d day of December, 1871, the amount was $4,754.97, and the witness produced a list of the policies on which such commissions had been collected.

That, with the additional fact heretofore adverted to, that the plaintiff gave no evidence to establish that any of these policies had lapsed, certainly made evidence for the consideration of the jury. If not, then the jury, on motion, should have been instructed to disregard the evidence, and to render a verdict for the amount that was shown to be due plaintiff regardless of the counter-claim.

The effect of the ruling complained of is to be considered in determining its correctness.

Here are commissions actually amounting, in the last year preceding the time covered by this action, to upwards of $8,000. They were to continue twenty-five years, constantly and slowly decreasing, but calculated not to be extinguished in that period. It would be safe to say they would amount to over ten years of the full amount; that is, to over $80,000. Is this judgment a bar to defendant's demand? Plaintiff claims that it is, and a vested right of this large amount is wrested from defendant by the forms of law. What answer can be made to plaintiff's claim? The pleadings put it in issue; evidence upon the subject is admitted without objection; the Judge submits this evidence to the jury; the jury render their verdict against defendant.

If this verdict shall stand, and this claim of plaintiff be established, then justice has been strangled in the meshes of form, and defendant has been defrauded in the temple of justice.

There is no fixed rule restricting or establishing the nature or quality of secondary or presumptive evidence.

"A presumption is an inference as to the existence of a fact not actually known arising from its necessary or usual connection with others which are known. The force of presumptions is almost intuitively perceived by mankind; and that principle of the mind which prepares, it to expect the future association of circumstances, because it has been accustomed to find them associated, can not be accounted for except by setting it down as imposed upon us by the law of nature."

"So the law presumes that a fact continuous in its character still continues to exist."

1 Phillips Ev. C. and H. note 177, and cases cited in subd. 7.

Where a given state of things is shown to exist, the law presumes that it continues, and the burden of

proof is upon the opposite party to show that it has changed.

Walrod *v.* Ball, 9 Barb., 271.
Smith *v.* N. Y. Cen. R. R., 43 Barb., 225.
Fry *v.* Bennett, 28 N. Y., 324.
Covert *v.* Gray, 34 How. Pr., 459.

The courts take judicial notice of the ordinary affairs and transactions of men, and under this rule, of the nature of the business of life insurance companies.

It is therefore well known that the policies issued by them are continuous in their character, and this knowledge was simply emphasized in this case by the limitation of the duration of the contract to twenty-five years, and the jury, as intelligent men versed in the affairs of men, would have undoubtedly made an allowance to the defendant if they had not been erroneously instructed by the Court.

Again, the test laid down by the Court was unphilosophical, and therefore illegal, for the law is the perfection of reason.

The value, importance and admissibility of evidence can not be submitted to the jury in the manner the Court did in this case. It reverses the due order of things. The evidence precedes, the consideration of the jury follows. In Dang *v.* Parker the question involved was whether a certain misrepresentation of authority to give a lease had been made, and it appeared that the promised lease was void under the statute of frauds. The trial Court admitted the evidence, and the plaintiff had a verdict. Mr. Justice Brady, then a member of the Court of Common Pleas, wrote the General Term opinion affirming the judgment, and laid down the following proposition of law in substance. The statute of frauds was enacted for the protection of honest men only; the jury had found defendant's conduct dishonest, therefore he was not within the purview of the statute, and affirmed the judgment.

The Court of Appeals unanimously reversed the judgment.

Dung *v.* Parker, 52 N. Y., 494.

In principle the decision of Judge Brady was identical with that of Judge Wallace. It was, if the jury had believed Dr. Parker had not been guilty of a fraud; then there was no evidence for them to consider, because the proposed lease was void; but if the jury believed Dr. Parker had been guilty of a fraud, then they should consider the evidence.

Counsel for Dr. Parker contended successfully in that case, as counsel contend in the case at bar, that the admissibility of the evidence must be determined by the Court, and that it can not depend upon the determination of any previous question by the jury.

The doctrine for which we contend is that the evidence received established a presumption that was sufficient for the jury.

This principle applies to all obligations shown to be in existence. They are presumed to continue in force until performed, or until under the statute of limitations they are presumed satisfied.

A policy of insurance is presumed to continue to the end of the term, and if it is to fail on failure to pay a premium note when due, the *burden is on the insurers to show it.*

Bliss on Life Ins., 628.
Hodsdon *v.* Guardian Life Ins. Co., 97 Mass., 144.

Third Point.—If the plaintiff in error were entitled to commissions, and the payment of them was unlawfully withheld, or they were not credited on any claim made by the company against him, he was entitled to interest thereon.

This proposition is too plain for discussion. The only explanation that can be made for this ruling must be that the learned Judge had in mind that view which he expressed in his charge as above excepted to, that there was no evidence that he was entitled to any commission. For of course if he had no claim to principal, he had none to interest.

The converse of the proposition is true likewise. If he had a right to recover any moneys, he had a right to interest thereon from the time they were converted to the company's use.

Fourth Point.—The Judge erred in excluding evidence of the probable duration of the policies in which plaintiff in error had a vested interest, and the mode offered of proving the same was correct.

In Ensworth *v.* N. Y. Life Ins. Co., in the U. S. C. Ct., N. Dist. of Ohio (7 Am. Law Reg. N. S, 334), a similar contract was under review under similar circumstances. Mr. Ensworth had been discharged, and thereupon brought his action claiming to recover at once the commissions on the renewal premiums on all the policies procured by him, and that the tables of the insurance companies afforded a means of estimating the amount.

The company contended that actions must be brought as the premiums were received.

The Court instructed the jury that if the contract gave plaintiff a vested right which became fixed on the execution of the contract, and could not be divided from other duties and other matters, then it was an entire contract and he was entitled to recover.

On this charge the jury rendered a verdict for plaintiff.

In Partridge *v.* Phœnix M. L. I. Co., 15 Wall., 573, the same question arose, and the same kind of proof was offered, and this Court held that in that case the evidence was not admissible because the contract did not give such right, but it at least left it open to argument that in a case like that of Ensworth the evidence would be proper.

This decision, therefore, does not conflict with the Ensworth case, and that decides that plaintiff in error had a vested interest in the policies not severable from the rest of the contract, and under it he had the right to give the excluded proof.

Fifth Point.—The judgment of the Circuit Court should be reversed and a *venire de novo* awarded.

WM. HENRY ARNOUX,
JAMES EMOTT,
Of Counsel.

SUPREME COURT

OF THE UNITED STATES.

WILLIAM S. MANNING,

vs.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

Brief of Defendant-in-Error.

JAMES C. CARTER,
Of Counsel for Defendant-in-Error.

New York:
E. WELLS SACKETT & BRO., LAW, BOOK AND JOB PRINTERS,
CORNER WILLIAM AND PINE STREETS.
1879.

E. Wells Sackett & Bro., Printers & Stationers, cor. William & Pine Sts., N. Y.

U. S. Supreme Court.

William S. Manning,
Plaintiff-in-Error,

vs.

The John Hancock Mutual Life Insurance Company.

STATEMENT OF CASE.

The John Hancock Mutual Life Insurance Company, a Massachusetts Corporation, the plaintiff in the Court below, sought to recover of William S. Manning, the plaintiff-in-error, divers sums of money collected by him as the agent of the Company in New York, and other sums paid by the Company for him and at his request.

The action was *indebitatus assumpsit*, embracing several counts suitable to the purpose.

The defendant below, in addition to pleading the general issue, availed himself of the privilege created by the act conforming pleadings at law in the Federal Courts to the practice in the State tribunals, and interposed a defence in the nature of a counter-claim.

This counter-claim sets forth that the Insurance Company, by an agreement in writing dated Dec. 12th, 1868, appointed the plaintiff-in-error and one William F. Hall its agents in the city of New York,

for procuring insurances, collecting premiums, &c., and that the compensation of the agents was to be a certain *percentage* of the premiums collected by them on such policies as should be secured by their efforts: that the agreement was to continue in force for three years from Sept 1st, 1868, and might be thereafter terminated by either party, upon giving to the other a notice of six months: that Hall afterward assigned his interest in the agency to the plaintiff-in error, who thereby became the sole agent: that afterwards, and on the 17th of September, 1870, this agreement was susperseded by another made between the Insurance Company and the plaintiff-in-error, and to continue for a period of three years from date of the dissolution of the partnership between the plaintiff-in-error and Hall, which was May 13th, 1870, by which new agreement the plaintiff-in-error was to be compensated by a fixed salary in the place of commissions: but that this new agreement was to be applicable only to new business, and the plaintiff-in-error was still to be entitled to commissions upon the renewal premiums collected by him upon such policies as had been secured by Hall and himself under the former agreement.

The counter-claim further sets forth, or intends so to do, a breach by the Insurance Company of the rights of the plaintiff-in-error under these agreements, by a dismissal from their employment and ejection from the office of the agency.

According to the view of the plaintiff-in-error, this dismissal involved consequences unusually grave, and of a threefold character.

First.—He seems to claim, that as far as relates to the policies secured by Hall and himself under the first agreement, the business of this New York agency constituted a kind of property in himself, which he was entitled to hold forever, or as long as the policies should subsist, notwithstanding the limitation of the continuance of the agency, and that his dis-

missal by the Company, constituted a sort of wrongful appropriation of this property, for which the Company was bound to pay to him its value, which he modestly estimated at the sum of $84,000. (Record, p. 4, fol. 13).

Second.—He claimed his salary at the rate of $5,000 per annum until the termination of the period of three years fixed by the new agreement, although this would not expire for a year or more after the answer was filed (Record, p. 4, fol. 14).

Third.—The plaintiff in error found a still further consequence of this alleged wrongful dismissal. He alleged that, upon the faith that no *unfriendly interference* with the business of the agency would come on the part of the company, he had advanced a large sum of money ($9,000) in the purchase of the interest of his partner, Hall, and that by his dismissal, and the consequent breaking up of his agency business, he had lost this money, in addition to losing the value of the business itself. (It would seem that the value of the business which he had before claimed would include this $9,000, which he had paid for half of it, and consequently that he was claiming half of the value twice). He also claimed (apparently forgetting that the new agreement did not give him any commissions on new business, but rewarded his labors with a fixed salary); that he would, but for this wrongful dismissal, have gone on and built up an additional business of great value to himself; and for the breaking up of these anticipations, and the loss of the $9,000 above-mentioned, he claims an additional $20,000 (Record, p. 5, fol. 15.)

The allegations constituting this counter-claim were all traversed by the Company (Record, p. 9).

The cause was tried before a jury in November, 1875, and the plaintiff below had a verdict for $10,982.72 (Record, p. 9).

The plaintiff-in-error made a bill of exceptions, in which he complains of certain rulings made by the learned judge at the trial; but he seems to have framed his bill so imperfectly as to fail to give this Court any sufficient notion of what his rights as the agent of the Insurance Company were, and consequently to preclude any review of the rulings of which he complains; but the grievances *alleged* by him are two in number:

First.—He sought to prove the *interest* from May, 1871, to *the time of trial*, on the sum of $8,391.14, which sum he testified would be the commissions he would be entitled to on the premiums upon outstanding policies secured by Hall and himself, being not only those commissions which he assumed to have fallen due down to the time of suit brought, but also those assumed to have fallen due subsequently and down to the time of trial.

Second.—The Insurance Company claimed that their dismissal of the plaintiff-in-error was called for and justified by gross misconduct on his part. This the plaintiff in error denied. He gave no evidence whatever showing the amount of premiums *actually collected* by the Company upon the annual renewals of policies which he *claimed* belonged to the old business of Hall and himself, and indeed, no evidence of the aggregate amount of such policies or the premiums thereon, except such as he derived from a memorandum made by a person not qualified to make an admission binding upon the Company. He claimed that the Company, by ejecting him from the agency, had deprived him of access to the means of proof by which he could have shown the amount of these policies, of the premiums thereon, and the amount of the latter actually collected, and consequently the amount of commissions to which he would be entitled.

The learned Judge charged the jury, that if upon

the evidence they found the dismissal to be rightful, the plaintiff (whom he held to be entitled in any event to commissions on the renewal premiums of a certain class of policies) was bound to prove the amount of such premiums and the amount collected since the dismissal by regular and competent evidence, just as if he had the books and papers under his control; and that of such evidence there was none in the case, but that if they found the dismissal to be unjustifiable, then the imperfect evidence given by the plaintiff-in-error of the amount of the renewal premiums was sufficient, and they might *assume, without proof*, that the Company had collected the whole. To this ruling, so extremely indulgent to him, the plaintiff-in-error nevertheless excepted. Any question debatable in this Court must arise on one or the other of these exceptions.

POINTS.

First Point.—A bill of exceptions is not an appeal for relief against an adverse judgment founded upon the *general merits* of the controversy. It is an assertion by the party bringing it, that, whatever the general merits may have been, in his effort to establish at the trial what he deemed to be his rights, the judge, in some particular point or points, denied him the benefit of some rule of law. It is, therefore, a proceeding *stricti juris*, and the exceptions cannot be sustained unless they show *directly* and *affirmatively* that some such error was committed. The circumstance that it is not a review of the judgment upon its general merits, the presumption that every judgment is correct until the contrary is shown, and the fact that the tendering of a bill of exceptions is the act of the party alleging a grievance, and that he may

express it in his own language and way, so long as he makes it consistent with the truth, all concur to mark this step in legal procedure to be, as above-stated, *stricti juris.*

Second Point.—So far as any question is sought to be raised by the rulings excepted to they are questions concerning the rights of the plaintiff-in-error under his agreements with the insurance company; but what these rights are this Court does not and cannot know, for the reason that the plaintiff-in-error has not seen fit to set forth the agreements in the bill (Record, p. 11.) Manifestly this Court, which has not those agreements before it, can form no conclusion touching the correctness of the rulings of another court upon such agreements.

1. The plaintiff-in-error contemplated the setting forth of these agreements, and thus confesses the necessity of it. Indeed the bill sets forth nothing of any importance. It is rather a draft of *directions for preparing* a bill than a bill itself. The business may have been so left in consequence of some misapprehension or oversight, but this does not supply the deficiency.

2. In that part of the charge of the learned judge to the jury, which is set forth in the bill, some statement is made of the rights of the plaintiff-in-error under some agreements which were put in evidence, but this Court cannot use these statements as a substitute for the agreements themselves. They were not prepared as a statement of

the proof for an appellate tribunal. Indeed, they are themselves unintelligible without the evidence upon which they were based.

Leftwich *v.* Lecann, 4 Wall, 187.
Reed *v.* Gardner, 17 Wall, 409.

Third Point.—As already asserted, neither implication nor conjecture is available to supply what a bill of exceptions omits to state, but were we permitted to resort to such aids it would not avail the plaintiff-in-error.

We may *guess* that under the agreements with the insurance company, the plaintiff-in-error was entitled to commissions upon all premiums collected by himself or his sub-agents on a certain class of policies. The learned judge held that whether his dismissal was justifiable or otherwise, he was entitled to these commissions. But the plaintiff-in-error had no evidence to show the *amount collected*, nor any *direct* evidence to show the amount *collectable—i. e.*, the amount of the renewal premiums annually payable. He claimed that the company had dismissed and ejected him, and consequently deprived him of the means of proof. But this would not at all deprive him of such means. The legal armory, with its subpœna and bill of discovery, furnished him with all needed weapons. But he claimed that the company could not, by a wrongful dismissal, put him to such trouble. The judge *allowed his claim* (by an exercise of over-indulgence, it is respectfully submitted), and held that if the plaintiff proved the amount of outstanding policies, and the premiums

thereon, belonging to the class as to which the plaintiff-in-error was entitled to commissions. it should be *assumed*, until the company showed the contrary, that *all* the premiums, payable up to the time of the commencement of the suit, had actually been collected, and the jury might find, without further proof, the amount of commissions due to the plaintiff-in-error (Record, p. 15, fol. 50).

Under this indulgent ruling the plaintiff-in-error endeavored to show the amount of premiums collectable on this class of policies. He had no recollection of this amount itself, but had a memorandum, which, he said, was prepared from the company's books, not by himself, but by the book-keeper (Record, p. 11, fol. 38.) He did not call the book-keeper to show that it was correct, nor did he offer the memorandum itself in evidence (it was plainly inadmissbile as being mere *hearsay*), but he was nevertheless allowed to testify from it, and thus, in effect, really to put it in evidence. He went no further.

As the learned judge had admitted this species of proof *conditionally*, only in case the dismissal was wrongful, and as *that* was one of the matters in dispute, he was obliged to say to the jury that they could consider this evidence if they found the dismissal to be without sufficient cause; that otherwise they must disregard it. If any one has the right to complain of such a ruling, it certainly is not the plaintiff-in-error. What he really claims by his second exception (Record, p. 16, fol. 51), is that *without reference to the question of the propriety of his dismissal*, he was entitled to the assumption that all *collectable* premiums had been collected by

the Company, and this, too, *without expense*, so that he was entitled on this assumption to commissions on the full amount, without deduction.

Let us suppose the case to have been that the plaintiff-in-error was found by the Company to be embezzling the premiums collected by him, so that it became necessary to remove him summarily from his position and put another agent in his place to collect the premiums, to which other agent they would be obliged to pay, perhaps, the same commission, there would seem to be a high degree of absurdity in the claim by the dishonest agent that the direct consequence of his dishonesty was to entitle him to the whole of his commissions without the trouble of earning them, and to the assumption that the Company had collected the whole of them.

1. We have *supposed* a justification of the dismissal of the plaintiff-in-error, arising from the guilt of embezzlement. As to the particular offence of which he was guilty, we must rely upon supposition; but not as to his being guilty of some offence justifying his dismissal. On his own confession, he was indebted to the Company in the precise amount of the verdict (Record, p. 11, fol. 37). Had the jury held the dismissal wrongful, they must, in obedience to the charge (Record, p. 15, fols. 49, 50), have found a sum due to the plaintiff-in-error which would have extinguished or diminished the amount due to the Company.

   There is, indeed, another supposition possible, namely, that they found a larger sum due to the Company and diminished it by finding the dismissal wrongful and deduct-

ing from the amount found to be due to the Company the commissions due to the plaintiff.

But this not very probable conjecture is equally fatal to the exception, for, in that case, he would have the full benefit of his evidence, and consequently would have sustained no harm whatever from the ruling of the Court, even should it have been erroneous. It will be observed that the exceptions do not in any manner relate to the question of the dismissal. That was passed upon by the jury upon evidence as to which there was no exception.

Fourth Point.—Convenience has led to the discussion of the plaintiff's *second* exception *first.* But his first one (Record, p. 14, fol. 45) seems very trivial. He complains that he was not allowed to prove *interest* on a sum he alleged to be due to him. There are two answers to this:

First.—It is never a matter of right to be allowed to prove interest. If the principal sum is found to be due, the jury computes interest without proof. As a matter of convenience, the Court, in its discretion, often allows proof of it.

Second.—But the offer was to prove interest, on commissions assumed to have been due not only down to the time of suit brought, but also on those assumed to have fallen due subsequently and down to the time of trial. A defendant cannot recover by a

counter-claim a debt accruing subsequent to the suit, any more than a plaintiff can by his direct suit.

Rice *v.* O'Connor, 10 Abb. Pr., 362.

Lastly.—The judgment of the Court below should be affirmed with costs.

JAMES C. CARTER,
of Counsel for the Defendant-in-Error.